

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CHARLES A. FAHRIG and SHIRLEY A. FAHRIG,
Petitioners,
vs.

THE HONORABLE RICHARD S. DODGE, JUDGE,
COURT OF COMMON PLEAS,
MONTGOMERY COUNTY, OHIO,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO**

LEE C. FALKE, PROSECUTING
ATTORNEY OF MONTGOMERY
COUNTY, OHIO
ID #0003922

FRANCES E. McGEE-CROMARTIE,
Assistant Prosecuting Attorney
ID #0012044

PLEASE SERVE:

FRANCES E. McGEE-CROMARTIE,
Assistant Prosecuting Attorney,
301 West Third Street, Suite 50,
Dayton, Ohio 45402
Telephone: (513) 225-5773
ID #0012044

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NO. 90-214

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**RESPONDENT'S BRIEF IN OPPOSITION TO THE
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TO THE SUPREME COURT OF THE STATE OF OHIO**

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decisions of the Supreme Court of the State of Ohio.

**STATEMENT OF THE CASE
COURSE OF PROCEEDINGS
AND DISPOSITION BELOW**

This action was brought by Petitioners, Charles A. Fahrig and Shirley A. Fahrig, against the Honorable Richard S. Dodge, in the Court of Appeals for the Second Appellate District, Montgomery County, Ohio, seeking a Writ of Mandamus to compel said Judge to settle and approve certain motions they proposed. The Fahrigs had caused to be filed with

the Common Pleas Court of Montgomery County, Ohio, a legal malpractice action and the Honorable Richard S. Dodge, a Judge in the Common Pleas Court of Montgomery County, Ohio, the Judge to whom the case was assigned, overruled seven (7) of Petitioners' nine (9) motions. In response to the Petition for said Writ of Mandamus, Judge Dodge had filed a Motion to Dismiss the Complaint on the grounds that the Complaint did not state a claim upon which relief could be granted at App. of Pet. for Cert., p. A-28.

On November 23, 1988, the Court of Appeals granted Judge Dodge's Motion to Dismiss, finding that Petitioners did not meet the three (3) prong test for issuance of the Writ. Order at App. of Pet. for Cert., p. A-2. Petitioners then appealed the dismissal of their Complaint for a Writ of Mandamus to the Ohio Supreme Court. The Ohio Supreme Court dismissed the proceeding for failure to file in a timely manner, at App. of Pet. for Cert., p. A-1. Petitioners' Motion for a Rehearing on the matter denied at App. of Pet. for Cert., p. A-6. Petitioners then filed this Petition.

REASONS FOR DENYING THE WRIT

The Petition for Writ does not present a substantial federal question under the circumstances of this case.

Petitioners are seeking review of the Ohio State Supreme Court's decision which is pendant to any federal claims they may have had. In this case, the State Supreme Court dismissed Petitioners' case on the ground that their Brief was not timely filed. Petitioners were given until September 26, 1989, to file their Brief with the Ohio Supreme Court. (App. Res. Brief, p. 2.) Said Brief was not filed until October 18, 1989, at Pet. for Cert., p. 8. That decision should not be reviewed since it does not merit scrutiny from this Court. *Butner v. United States*, 400 U.S. 48, 51 (1979). It has been held that this Court defers to the lower courts in the interpretation and application of state law. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 485, N. 13 (1986); *United States v. S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, N. 12 (1984); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 214 (1983).

The State Supreme Court of Ohio has long held that "[w]here a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred." *The American Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147, 150, 70 N.E. 2d 93, 94 (1946); *Budget Commission of Brown County v. Village of Georgetown*, 24 Ohio St. 3d 33, 36 (1986); *Buckeye Candy & Tobacco Co., Inc. v. Limbach*, 28 Ohio St. 3d 40, 41 (1986). One inherent condition of any appeal is that it be filed in a timely manner, this is a prerequisite to the perfection of any appeal. Petitioners failed to recognize this basic fact when they filed their Brief twenty-two (22) days after it was due. By failing to comprehend this important procedural factor, Petitioners firmly closed the door to any other review to which they may have been entitled.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the Ohio Supreme Court should be denied.

Respectfully submitted,

**LEE C. FALKE, PROSECUTING
ATTORNEY OF MONTGOMERY
COUNTY, OHIO
ID #0003922**

**FRANCES E. McGEE-CROMARTIE
Assistant Prosecuting Attorney
ID #0012044**

ATTORNEYS FOR RESPONDENTS

Please address all Communications to:

**Frances McGee-Cromartie
Assistant Prosecuting Attorney
301 West Third Street, 5th Floor
Dayton, Ohio 45402
Telephone: (513) 225-5773**

A P P E N D I X

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Second Appellate District
Montgomery County, Ohio

This case originated in the Court of Appeals

THE STATE OF OHIO ex rel
CHARLES A. FAHRIG and
SHIRLEY A. FAHRIG,
Relators-Appellants

v.

THE HONORABLE RICHARD S. DODGE, JUDGE
Respondent-Appellee

RELATORS-APPELLANTS' MOTION TO FILE BRIEF INSTANTER

Charles A. Fahrig,
Shirley A. Fahrig,
27 Loganwood Drive,
Centerville, Ohio 45458
(513) 433-0546

Appearing Pro Suis as
Relators-Appellants

Maureen C. Newkold
Assistant Prosecuting Attorney
for Montgomery County, Ohio
Third Floor
Montgomery County Courts Bldg.
41 North Perry Street
Dayton, Ohio 45402
Telephone (513) 225-5757

Attorney for Respondent-Appellee

Relators-Appellants, by the within Motion To Allow Filing
Of Relators-Appellants' BRIEF instanter, respectfully ask this
Court for leave to file their BRIEF instanter.

MEMORANDUM

1. Relators-Appellants' Brief was due as-within-rule September 28, 1989.
2. Because Relator-Appellant had been summoned to serve as a Juror from September 5 through September 26, 1989, Relators-Appellants requested an extension to October 17, 1989, which this Court denied on October 4, 1989.
3. Relators-Appellants have filed on October 16, 1989, a Motion for Rehearing, Etc. as-within-rule and requesting reconsideration so that they may file their Brief Instanter.

Relators-Appellants respectfully ask that the within Motion be granted.

Respectfully submitted,

/s/ CHARLES A. FAHRIG

/s/ SHIRLEY A. FAHRIG,
27 Loganwood Drive,
Centerville, Ohio 45458
(513) 433-0546

PROOF OF SERVICE

A copy of the foregoing Motion To File Brief Instanter was mailed to Maureen C. Newkold, Montgomery County Courts Bldg., Dayton, Ohio 45402, by regular U.S. mail on October 18, 1989.

/s/ SHIRLEY A. FAHRIG